Date: June 2, 1999

Case No. 1999-SOC-1

In the Matter of

CHIEF, DIVISION OF ENFORCEMENT
OFFICE OF LABOR-MANAGEMENT STANDARDS
EMPLOYMENT STANDARDS ADMINISTRATION
Complainant

v.

LOCAL 738, AMERICAN FEDERATION
GOVERNMENT EMPLOYEES,
Respondent

RECOMMENDED DECISION AND ORDER

This matter arises under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101, et. seq., (CSRA) and the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 481, et. seq., (LMRDA) and the Standards of Conduct Regulations (SOC) issued pursuant to the CSRA, promulgated at 29 C.F.R. Parts 457-459. On March 4, 1999, the Chief, Division of Enforcement, Office of Labor-Management Standards, Employment Standards Administration, (Chief) filed a complaint alleging that Local 738, American Federation Government Employees (Respondent) violated Section 401(g) of the LMRDA, 29 U.S.C.§ 481(g), by spending money to publish articles in its May and June 1997 newsletter, the Lamplighter, critical of its incumbent President, Spencer Long thereby potentially affecting the outcome of a subsequent election of Respondent's president on November 12, 1997.

After the complaint was forwarded to the Office of Chief Administrative Law Judges, a hearing was set before me for May 18, 1999 in Kansas City, Kansas. Prior to commencement of the hearing the parties entered in a joint motion which I approved requesting that the case be decided on

the basis of a stipulated record including a joint stipulation of facts, the parties pre-hearing submission, May and June 1997 issues of the Lamplighter newsletter and the parties briefs.[1]

FINDINGS OF FACT

Based upon the parties stipulation and Respondent's answer to the Complaint, I find the following facts:

1. Spencer Long (Long) was president of Respondent, from approximately November 8, 1994 to November 12, 1997.

2. Long was a member in good standing at the time of Respondent's election of union officers held on November 12, 1997 and at the time of the complaint.

3. Respondent, is, and at all times relevant to his matter has been a labor organization within the meaning of Section 701 of the CSRA and an unincorporated association with a mailing address of P. O. Box 2334, Fort Leavenworth, Kansas 66207 and an office located at Lee House, Apartment D, Biddle and Organ Streets, Fort Leavenworth, Kansas 66207.

4. Pursuant to Respondent's Constitution, Respondent is, and at all times relevant to this action has been, a separate, independent organization functioning in confirmation with the Constitution of the National American Federation of Government Employees, AFL-CIO, hereinafter referred to as the National.

5. Respondent represents civilian employees working for the Department of Defense at Fort Leavenworth, Kansas.

6. Respondent had approximately 134 members at all times relevant to this action.

7. On April 8, 1997, Long was suspended from the office of President of Respondent for 90 days.

8. Long appealed this suspension to the National, and it was reduced to 60 days.

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[1]After the initial submission of briefs, Counsel for Complainant, filed a motion to file a reply brief along with a reply brief contending that Counsel for Respondent had previously agreed to limit his brief to the issue of whether Respondent's resources were used in the publication of Respondent's May and June 1997 Lamplighter newsletters. When Respondent's Counsel filed his brief other issues were addressed necessitating the reply brief. Inasmuch as no opposition was filed to this motion, I grant Counsel for Complainant's motion.

9. It is typical practice of Respondent for union resources, such as computers, printers, paper, and electricity, to be used to produce the articles and letter which are subsequently printed in the newsletters. It is not currently known to what extent this happened with the newsletters at issue in this matter.

10. Pursuant to an agreement entered into by the immediate past-president of Respondent, Jim Lineker, the Chronicle Shopper, Inc. published Respondent's Lamplighter newsletters without cost to Respondent in exchange for revenues produced by the sale of advertisements in the newsletters.

11. The newsletters were mailed third class by the Chronicle Shopper, Inc. usually by the middle of the month.

12. During the time Long was suspended, articles were published in the May and June, 1997, Lamplighter newsletters regarding his suspension.

13. These newsletters were mailed by the Chronicle Shopper, Inc. to members of Respondent.

14. On June 6, 1997, Long returned to the office of President of Respondent.

15. On October 15, 1997, nominations were made or the upcoming elections of November 1997.

16. Long was one of the two nominees for the office of President.

17. Art Bradford (Bradford) who was the other nominee, was not a candidate when May and June, 1997, Lamplighter newsletters were published.

18. On November 12, 1997, Respondent held an election for nine offices, including office of the President.

19. Long ran as the incumbent for office of the President .

20. Long lost the election by a margin of 26 votes to Bradford.

21. By letter dated November 20, 1997, Long filed a protest with Respondent's Election Committee alleging that numerous offenses occurred during the November 12, 1997 election of union officers which rendered the results unfair.

22. The Election Committee denied Long's protest after which Long appealed the Election Committee's decision to Respondent's District 9 National Vice President, Gary D. Miles. Miles denied the appeal after which Long appealed Miles' decision to Respondent's National

President Bobby L. Harnage who in turn denied Long's appeal. Thereafter, Long, having received a final decision under Respondent's national constitution, filed a timely protest with the Department of Labor.

23. By letter dated November 16, 1998, Bradford as president of Respondent agreed to conduct new nominations and elections for the positions of president and chief steward of Respondent. By letter dated December 3, 1998, Respondent's Executive Committee voted to unilaterally withdraw from its agreement to rerun the nominations and election for the office of president but would comply with its agreement to rerun the nominations and election of chief steward.

The alleged offensive May 1997 Lamplighter issue consisting of 7 pages, contained the following headlines: Local Conducts Trial for President. The lead article consisting of 6 paragraphs read as follows:

> Local 738's President was tried in the month of March 1997 for seven different charges. This trial resulted in the President being found guilty of three of the seven charges against him. This resulted in the suspension of the President for ninety days. The date of the suspension was 8 April 1997.
>
> The seven charges against the President were as follows: negotiated with management, engaged in conduct unbecoming a union member that resulted in malfeasance in office, refused to allow the Chief Steward to perform the duties prescribed, provided the General Membership with false information, allowed privilege information about a client to be disseminated by another member to the general membership, denied a member of proper representation, prevented the Chief Steward from performing her elected duties.
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> There were three members that presented complaints or charges to the Vice President of the Local. The Executive board at the request of the Vice President approve a panel committee to investigate these charges. The panel was composed of the Vice President, Secretary/Treasurer, Sergeant at Arms. The panel heard about 5 hours of testimony against the President from many different members. The President elected not to meet with the committee but to respond in writing. The committee found there was enough evidence to charge the President with the seven charges above.
>
> A trial committee was appointed by the membership and the trial date was set to begin on 5 March 1997. This committee was composed of,

> Mr. Mike McMaster, Ms. Theresa McMillian, Mr. Rich Blanchard.
>
> This trial committee finding and verdict was upheld by the membership on 8 April 1997.

The remainder of the May, 1997 newsletter consisted on a brief article from the Sergeant of Arms, Bill Hedges, informing the membership that the Local was still operating under acting president, Art Bradford, an article from Bradford stating how he had supported Long in the past and his efforts in saving the Local from bankruptcy, and asking support of the membership during the next 90 days plus articles from the union treasurer and chief steward explaining about Long's trial, and Bradford's work as past treasurer. The article from Bradford entitled "Let's Set the Record Straight" read as follows:

> I have served as a Steward, Treasurer and now as Vice-President. I have supported our President during the most difficult times. When everyone else turned their backs on him, I stood firm. I fought by his side during the last election and helped too. I helped get him elected. I bought him a drink at the local club after his election. I was the only one. I defended him when others attached him. I stood by his side when the 9th District Headquarters investigated him. I was alone in the boat.
>
> I have spent many a long night with my wife at our home trying to get the financial records of this Local straight. I spent many long hours with an IRS agent, to try to save this Local from going bankrupt. I spent ten hours a day at my home on my day off with the Department of Labor to save this Local. There was not one person from this Local there except a former Treasurer of this Local, Sherie Shade: (Thanks Sherie)
>
> At out last membership meeting there seemed to be some confusion as to who got this Local back on its feet. I will not say that I did all the work, as other people would like for you to think they did, but I did at least 85%. I will say during this administration there has never been a dollar misspent, not because the President has kept control but rather that there have been honest records kept. All reports have been on time to both National, and the membership will not say that it was because of myself but rather as a group effort. I recommended Ms. Hall as Treasurer after I became Vice-President and the Executive board approved. I have assisted Ms. Hall in every possible way. I will continue to do just that.
>
> During the next nine days I ask that all of you gather around me and

the Executive Board and give us all the support you can.

The next article written by Respondent's treasurer entitled "From the Desk of the Treasurer read as follows:

> At the April general Membership meeting of Local 738 a body of 54 people signed in; 53 were actual dues paying members and one was not a member. Fifty-four people to attend a union meeting is a record for this local. In the months I've been attending on a regular basis; we do good to get 15 members to attend.
>
> Why were so many members in attendance? Because Mr. Long had been accused of several charges and after a Trial Committee had reviewed hours of testimony for and against Mr. Long; they had made a decision regarding penalty and were about to announce that penalty. Union members came "out of the woodwork" so to speak, to see whether or not a penalty would be imposed and what kind of penalty it would be. Of the seven charges filed against Mr. Long; he was found guilty of only three.
>
> Mr. Long was given the opportunity to appeal to the membership on his own behalf and he proceeded to proclaim "I did this and I did that and it's because of my expertise that this or that happened..."
>
> About the only statement I could tell he truthfully made was "As President of this Local I am the Chief Executive Officer." Yes, as president he would be Chief, but like any other president he has a lot of "Indians" that work hand-in-hand with him or at least they should.
>
> Charges were not made against Mr. Long for <u>helping</u> union members. They were made because he didn't or wouldn't help union members; because he interfered with cases, he gave out false information regarding cases; he denied representation to grievants; and he talked out of turn about cases to members of the local who had no "need-to-know." These charges against Mr. Long were not made lightly.
>
> Mr. Long stated that, "Some members think that they can spend Union money as they see fit so they can acquire more power or status in their organization." As secretary/treasurer of this local, I can

attest to the fact that every penny this Union spends is accounted for and audits of the books are done by a refutable auditor to ensure the local's books are straight. It takes two signatures to write a check and there are only three people able to write checks; Mr. Long, Mr. Bradford, and myself. Reimbursements to members require a receipt and spending money of large amounts must be approved by the Executive Board. I don't know how it was done in the past but since Vice President, Mr. Bradford was treasurer and since I was appointed, that's how it works.

Through Mr. Bradford's diligence and hard work as Past Treasurer, he got the books squared away. He had an auditor come in and audit the books and Department of Labor went through every shred of paper and back several years of unfiled paperwork to get the Local into the "Black." Mr. Bradford should have, at the very least, received a pat on the back for all his efforts. Since I took over as treasurer, my job has "been a piece of cake" because Mr. Bradford automated the bank accounts and has helped me tremendously. Bills and taxes are paid on time; monies are deposited, checks are written and entered into the computer, receipts are filed and annotated with the number of the check and date it was paid, etc. The books balance! Mr. Long has no idea what's paid or is in the accounts unless I tell him because he doesn't pay the bills or maintain the accounts.

Mr. Long stated that "Some members have an agenda..." to make him look bad and hope they could run for his position. I don't think that's true. Yes, Mr. Bradford had talked about running next election (November) for the President position but I believe if he wanted to make Mr. Long "look bad" he would never have sat down and tried to discuss problems and workable solutions to problems with Mr. Long. Mr. Bradford tried hard to iron out the problems before any charges were filed but Mr. Long continued to boast "I am the President; I am the Local" I ask you--what kind of leader is that? His local is falling apart and he won't try to work out solutions. Mr. Bradford could very easily have sat back and let Mr. Long "sink his ship" rather than try to help him "patch up the holes." If anyone else is or was thinking about running for president, I don't know anything about it and with the regularly poor attendance at monthly meeting; I can't image anyone being interested enough to want to hold down the president's job.

Mr. Long also made the statement that "Some members are just naive and just going along with the flow and allow the other

members to lead them around." YEP! He hit the nail on the head with that statement. Our local's members are naive because (1) they don't attend regular meetings and get ALL the information and (2) they let people like Mr. Long tell them how to vote on issues. Unfortunately for Mr. Long, we know this is true because some people he approached and told to vote a certain way for a certain issues came forward later, admitting that Mr. Long had told them to vote a certain way and later realized they'd been duped by what they'd been told; or they came asking questions to get the full story before they voted.

People who voted at that meeting were there because they were told to be there. That's a given! The majority of the people didn't have a clue as to what they were voting for. They were there because they were friends of Mr. Long or because they wanted something done about Mr. Long. Cut and Dried!

Of the 53 Union members who signed in only 23 are what you could actually call regular attendees to monthly meetings and out of those 23; eight have only been to one or two meetings that I can recall. The remaining 15 members are fairly regular in attendance. So, what does that tell you? The vote for accepting the recommended penalty was 25 to 22. Forty-seven people voted, one was not a member and the remaining six people abstained from voting. Over half of the people, who voted wanted something done about Mr. Long; that's why they were there. Over half the people who voted had some sort of gripe or complaint or run in with Mr. Long. Sure, if Mr. Long had contacted a few more people to vote against the penalty he'd have beat out the people voting for the penalty. But in the same breath, so could the "for the penalty" side. There were people who wanted to be there to vote and got tied up at work, etc.

No one is out to make Mr. Long "look bad." They want a fair shake and apparently Mr. Long has stepped on enough toes that the membership has had enough to want a cohesive working union they can depend on to get things accomplished. They want their grievances taken into consideration. If they can't work with Mr. Long or a particular steward then it's our responsibility to find a steward they can work with. That's why we have numerous stewards. All the "in house" fighting has affected the whole local and it's time for it to end.

No one ever said that Mr. Long wasn't trained in various areas of the union's job; grievances, arbitrations, etc. The problem is that

> he can't work with every Union member or they won't work with him. If someone doesn't want him to represent them what good does all his training do?
>
> Mr. Long may be the Executive Officer of the Local because he's the President, but Mr. Long has several hardworking, capable people who work for him and their only goal is to help people and have a smooth running local that we all can be proud of.
>
> I fear Mr. Long's penalty of three months suspension has only heightened and prolonged the problem. Everything that was set out to be accomplished--to make a workable Union with workable people didn't get done. In three months the "infighting and back biting" will pick up where it left off and will in fact be worse because there will be an "old score" to settle.
>
> I don't feel Spencer Long is above board in all his dealings. Too many people have too many complaints and we as members of Local 738 should take that into consideration and cause us to wonder just where out problems lie. Personally, I have no battles with Mr. Long because he and I rarely speak to one another. I do my job and he leaves notes all over my desk. But I have sat back and watched and listened, making my own opinions and Mr. Long is for no one but himself. After all he does expound "I am the President; therefore, I am the Local!"

The final article written by Respondent's Chief Steward, Alicia Combs entitled "Working together to regain strength read as follows:

> I have a T-shirt and printed on the front of it is the following logo: AFGE - Proud to Make America Work. I used to wear it occasionally but I haven't in the past several months. I took it out of the dresser before the trial and looked at it for awhile. Seeing it made me wonder exactly what the logo was supposed to mean? AFGE - proud? Not here, not anymore I told myself and I believed it. In the past six months I had seen Local 738 literally washed down the drain by the President who was running this Local like he was the dictator. He let the office go to his head and forgot about the people who put him there. Complaints about the Local not representing the people or their interests were not taken seriously and were brushed aside because the president can do what he wants. He is the MAN, or so he said. As an elected official and dues paying member of this Local I felt obligated to attempt to stop this behavior.

> I am one of the people who filed charges against the president. I must confess that I have questioned the rationality of this act several times. I cannot begin to list the tactics that have been used to try and force me to drop the charges - I can say they have been numerous and very underhanded. It would be a lie to say I didn't consider giving in to them. I was being selfish and thinking only about me and what I was going through. I almost forgot about you the membership, but because there are a few honest people on the Executive Board who truly care, I was able to stay the course. On April 8th when the vote was counted and the Local won 25-22 I realized that AFGE is Proud, and it does make America work. I want to say Thank You to those individuals who stood beside me and said this behavior cannot continue. The road ahead is long and narrow and it is all uphill but with help and support from all of you, Local 738 will muddle through and become strong again.

In the June, 1997, issue of the Lamplighter, Respondent's vice president, Robert E. Owens Jr. wrote an article entitled " Ensuring Fair, Open, Honest, Equal Representation for all at Local 738. This article read as follows:

> On April 30, 1977, the Executive Board held its monthly meeting. Mr. Bradford, acting President, resigned from office.
>
> During the meeting the Executive Board appointed Mr. Robert Owens to fulfill the unexpired term of Vice President until the November elections are held.
>
> During the past four months this Local has undergone tremendous stress and change. Our Local President, Mr. Long, was charged with and prosecuted on seven counts; found guilty on three charges, and suspended from office by the membership for 90 days.
>
> As a member in good standing, I am very concerned with the image our Local is projecting to our members, management, and the general public.
>
> The American Heritage dictionary includes seven definitions for the word "Vision." Definition number three defines "Vision" as, "The manner in which one sees or conceives of something."
>
> What vision does our Local project to our membership, management, and the general public? One of mass confusion, petty

> bickering, internal fighting, manipulation, secretiveness, and non representation for certain members.
>
> It is my vision to see this Local project openness, honesty, fairness and equal representation under the law for all members.
>
> I pay my union dues for fair, open, honest and equal representation. Honestly, I have not been getting my monies worth.
>
> I do not like the internal turmoil and strife inflicted upon this Local by one member. There is NO fairness, NO openness, NO honesty, and NO equal representation for anyone. We are at a state of anarchy.
>
> I do not want to see this Local run into the ground because one member requires total subservience and control. When you walk away or say "This does not involve me," or "I do not want to be a part of this mess," you give up your right to open, fair, and equal representation. You do not get your moneys worth; you throw away everything.
>
> In order for this union to survive, each and every member must demand fair, open, honest, and equal representation for all members. We, as union members, must put aside any and all prejudices and bigotries. We must become a cohesive organization, willing to work with and for each other, for a common goal. Fair, open, honest, and equal representation for all members. We need to remember what is at stake. OUR JOBS.
>
> I would like to enlist each and everyone's support to keep this Local functioning for all. We cannot stand idly by to let a partisan few manipulate, control, and deny our basic right to fair, open, honest and equal representation. We must be bipartisan to ensure fair, open, honest and equal representation for all.

Owens' article was followed by additional articles from Ted Roberts, Respondent's secretary/treasurer, and Bradford. The secretary/treasurer's article read as follows:

> The recent suspension of Mr. Spencer Long as President has not impeded the Local's business. Bills continue to be paid on time and the monies are being deposited.

> Mr. Art Bradford is still on the signature authority paperwork at Army National Bank, as the third person authorized to cosign written checks.
>
> Mr. Gary Miles, 9th District Vice President, has given up approval to carry on the Local's business with Mr. Bradford still cosigning until Mr. Long is reinstated to his office in July.
>
> Members of the Local are welcome to review the Treasurer's books if there are any questions as to what's being paid out and what deposits are being made. Copies of the Treasurer's report is also handed out at the monthly General Membership meetings.

Bradford, who resigned his office in Respondent, wrote an article entitled " A Message from the Ex-Vice President. This article read as follows:

> Yes, it is true, and I did resign. It was a difficult decision for me to make, but I will not have my character questioned and slandered. I would like to think that I have done a good job while serving the Local and I hope that I can continue in the future.
>
> My resignation was turned into the Executive board at the last meeting after I received from the National Executive Board (NEC) a copy of Mr. Long's appeal. In his appeal there are some fifteen to twenty statements about me. All of the statements were misleading and not true. I cannot and will not stand by and have Mr. Long attack me for no reason. I did my duty to the Local during Mr. Long's trial. I never at anytime made statements against Mr. Long. Mr. Long called me to testify for him on his behalf and every statement that I made was true. Why he chose to attack me personally, I don't understand.
>
> After I had given careful thought to the letter, I became upset and very angry. I made an appointment with my attorney to discuss this article. At the advice of the attorney I resigned my position on the Executive board which in turn opened the door for any legal action that I might want to pursue.
>
> I also discussed this problem with the 9th District Headquarters but they were unwilling to help. The advice that I got from them was

that I should do what ever I wanted.

I made a decision on the 14th of May, 1997 after the Local's monthly meeting to pursue some type of legal action.

The article written by Ted Roberts entitled " SJA agreement signed by Mr. Long nullifies arbitrators" read as follows:

In early 1993 Jeff Shugart, Ted Roberts, Loren Michellsen and Herby Mayfield filed a Pre-Selection case against management at Directorate of Public Works. They went through all the required grievance steps, mediation and arbitration. The arbitrator, Mr. Spellman, awarded them the decision which basically said Pre-Selection had occurred and to readvertise the Supervisory Engineering Technician position with the tour Engineering Technicians being the only applicants. The other candidate was an "Air Conditioning Mechanic."

Management at Directorate of Public Works chose to ignore Mr. Spellman, the arbitrator's decision. The four Technicians again filed a second pre-selection case and went through all the required grievance steps, madiation and arbitration. The arbitrator, Mr. Zachrich, awarded them the decision which again said Pre-Selection had occurred and to readvertise the Supervisory Engineering Technician position with the Engineering Technicians being the only applicants.

Management at Directorate of Public works again chose to ignore Mr. Zachrich's decision. The first arbitration case was handled by the Unions exclusive representative, Mr. Frank Kohl and the second arbitration case was handled by the Unions exclusive representative, Mr. Jeff Baxter. Both attorney's spent a lot of time and effort working with the four Engineering Technicians to achieve the arbitration decisions.

The Union expense was $1300 for the first arbitration and $1600 for the second arbitration. Since the second arbitrator's decision they have been working to prepare their case for Federal Court.

In January of 1997 they learned that Mr. Spencer Long signed an agreement with SJA in April 1996 which basically nullified the

Arbitrator's decision. This decision by Mr. Spencer Long was made without consulting with the exclusive representative Mr. Jeff Baxter, the four Engineering Technicians and Union members.

The Union membership voted unanimously for Union support of the arbitration case. The agreement signed by Mr. Spencer Long was done behind close doors in secret between him and SJA. In November 1996 the arbitrator sent a letter to the Commanding General demanding why his decision was not being upheld.

In January 1997 when the Arbitrator Mr. Zachrich and the Attorney Mr. Jeff Baxter were in a conference telephone call, Mr. Zachrich informed Mr. Baxter that Mr. Spencer Long had no right to sign this agreement. Furthermore he stated that SJA as the representative of the Army did not have the right to propose the agreement. He also recommended that the four engineering technicians file a grievance with the local union to nullified the Spencer Long April 10, 1996 agreement before the arbitrator could take action.

Mr. Art Bradford said that in April 1996 Mr. Spencer Long was laughing and joking about how he got even with the four Engineering Technicians. Any intelligent Union President would have used the arbitrator's decision as a mainstay to promote union membership, boost union morale and solidify the cornerstone of a fair and honest Union.

The Public Relations for the victories for both arbitrations and the possible victory in Federal Court would be a tremendous asset for AFGE Local 738. By signing the agreement Mr. Spencer Long gave away $2,900.00 of union funds, countless man-hours of work and Union boating rights for the simple reward of "Getting Even."

In the June Union meeting they are asking you, the Union members, to support their case and vote to rescind the agreement made by Mr. Spencer Long. This will allow them to proceed to Federal Court to protect the rights of Government civilians. Your vote will correct the mistake made by Mr. Spencer Long and will send a message to him that honesty and fair play will be the number one priority.

CONTENTION OF PARTIES

Complainant alleges that Respondent violated Section 401(g) of the LMRDA by using its resources to publish the May and June 1997 Lamplighter newsletters in which the above articles critical of the incumbent candidate Long appeared. Allegedly these articles may have affected the outcome of the November 12, 1997 election in which Long lost his reelection bid for Respondent's president to Bradford.

Complainant's allegation involves 4 assertions: **(1)** Union resources were utilized to produce the Lamplighter newsletters - Donovan v. Metropolitan District Council of Carpenters ,797 F.2d 140 (3rd Cir. 1986); Donovan v. Local Union 70, International Brotherhood of Teamsters, 661 F.2d 1199 (9th Cir. 1981); Schultz v. Local Union 6799, United Steelworkers of America, 426 F.2d 969 (9th Cir. 1970), aff'd on other grounds sub.nom., Hogson v. Local 6799, United Steelworkers of America, 403 U.S. 333 (1971); Reich v. Local 843, Bottle Beer Drivers, 869 F. Supp. 1142 (D. N.J. 1994); McLaughlin v. American Federation of Musicians, 700 F. Supp. 726 (S.D.N.Y. 1988); Donovan v. Local 719, United Automobile Aerospace and Agricultural Implement Workers of America, 561 F. Supp. 54 (N.D. Ill. 1982); Brennan v. Sindicato Empleados de Equipo Pesado, 370 F. Supp. 872 (D.P.R. 1974); **(2)** As incumbent union president Long was a candidate for Office of the President - Guzman v. Local 32 B-32J, Service Employees International Union, 151 F.3d 86 (2nd Cir. 1998); McLaughlin v. American Federation of Musicians; New Watch-Dog Committee v. New York City Taxi Drivers Union, Local 3036, 438 F. Supp. 1242 (S.D.N.Y.); **(3)** The tone and contents of the Lamplighter newsletters went beyond a presentation of facts by attacking and criticizing the incumbent president - Donovan v. Metropolitan District Council of Carpenters ; Reich v. Local 843, Bottle Beer Drivers; McLaughlin v. American Federation of Musicians; Brock v. Connecticut Union of Telephone Workers, Inc., 703 F. Supp. 202 (D. Conn. 1988); Donovan v. National Alliance of Postal and Federal Employees, 566 F. Supp. 529 (D.D.C. 1983); Donovan v. Local 719, United Automobile Aerospace and Agricultural Implement Workers of America; Camarata v. Teamsters, 478 F. Supp. 321 (D.D.C.1979); Usery v. International Organization of Masters, 422 F. Supp. 1221 (S.D.N.Y.), modified on other grounds, 538 F.2d. 946 (2nd Cir. 1976); Hodgson v. Liquor Salesman's Union, Local No.2, 334 F. Supp.1369 (S.D.N.Y. 1971); and **(4)** The timing of the Lamplighter issues may have influenced the outcome of the election - Guzman v. Local 32 B-32 J, Service Employees International Union; Bliss v. Holmes, 721 F.2d 156 (6th Cir. 1983).

Complainant further argues, that since it showed use of union funds to potentially defeat an incumbent union president in the November 12, 1997 election, it established a *prima facie* violation of Section 401(g) shifting the burden to Respondent to show that said conduct did not affect the outcome of the union election Wirtz v. Local, Hotel, Motel and Club Employees Union, 391 U.S. 492 (1968); Wirtz v. Local 153, Glass Bottle Blowers Association, 389 U.S. 463 (1968); Usery v. Stove

Workers, 547 F.2d 1043 (8th Cir.1977); Schultz v. Local Union 6799, United Steelworkers of America, 426 F.2d 969 (9th Cir.1970), aff'd on other grounds sub nom., Hodgson v. Local 6799, United Steelworkers of America, 403 U.S. 333 (1971). Inasmuch as Respondent presented no rebuttal evidence, the November 12, 1997, election must be set aside.

Respondent contends that it spent no money or resources to promote the candidacy of any union official and that when the May and June 1997 Lamplighter newsletters were published, Bradford was not a candidate for union office and thus, his candidacy could not have been promoted. Further, the Lamplighter newsletters did not affect the outcome of the election, but rather Long's misconduct which led to his suspension for serious misconduct. According to Respondent, the Lamplighter was and is published by an independent organization, the Chronicle Shopper, at no cost to the local. Its May and June 1997 issues contained nothing offensive, but rather information informing Respondent's membership of Long's misconduct. These issues moreover had no impact on the union's November 12, 1997 election. McLaughlin v. American Federation of Musicians, 700 F. Supp. 726 (S.D.N.Y. 1988). Moreover, neither the timing, distribution, content or tone of the newsletters had anything to do with Respondent's elections held more than 5 months later but referred rather to the reporting of serious misconduct by Long which resulted in Respondent suspending him from office for 60 days.

ISSUES

1. Whether Respondent violated Section 401(g) of the LMRDA when it published articles in its May and June 1997 Lamplighter news letters critical of Long, Respondent's incumbent presidential candidate.

2. If Respondent's Lamplighter newsletters were violated of Section 401(g) of the LMRDA, could such conduct reasonable be said to have any affect on Respondent's November 12, 1997 of its presidental officer.

3. If Respondent's Lamplighter newsletters may have affected the results of the November 12, 1997 election, is it proper to declare the election of Bradford null and void, and order Respondent to conduct a new election under the supervision of the Chief and assess Respondent with the cost associated with this action.

DISCUSSION

The LMRDA in pertinent part at 29 U.S.C. § 481(g) provides :

> No monies received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this subchapter. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

29 C.F.R. § 452.75 entitled "Union newspapers" further clarifies Respondent's responsibility when publishing news letters by stating:

> The provisions of section 401(g) prohibit any showing of preference by a labor organization or its officers which is advanced through the use of union funds to criticize or praise any candidate. Thus a union may neither attack a candidate in a union-financed publication nor urge the nomination or election of a candidate in union-financed letter to the members. Any such expenditure regardless of the amount, constitutes a violation of section 401(g).

Respondent does not question the validity of either Section 401(g) or its implementing regulation at 29 C.F.R. § 452.75 for Congress expressed a clear need to remedy abuses in union elections without departing needlessly from the longstanding congressional policy against unnecessary governmental interference with internal union affairs. Wirtz v. Local 153, Glass Bottle Blowers Association at 389 U.S. 470-471; Hodgson v. Local Union 6799, United Steelworkers of America 403 U.S. at 338. Nor does Respondent question the fact that once a *prima facie* case of a violation of Section 401(g) is established, this is enough to warrant a finding that said conduct "may have affected" the outcome of the election so as to justify the Secretary directing another supervised election. Wirtz v. Hotel Motel & Club Employees Union, Local 6, 391 U.S. at 507-508.

What Respondent questions is Complainant's assertion that union money was used in the publication of its newsletters and even if such is found to be the case that nothing contained in the May and June Lamplighter newsletters contained material critical of Long as a candidate for union office but, rather, contained accurate information about his misconduct as a union officer that led to his suspension from office. As such, Respondent claims that such conduct is permitted by the provision to Section 401(g) which specifically allows for the expenditure of union funds to factually advise its membership of issues not relating to Long's candidacy.

In determining whether Respondent violated Section 401(g) it is first necessary to see if Respondent expended any money in the publication of its Lamplighter newsletter. The parties stipulated that it was a typical practice for Respondent to use its computers, printers, paper and electricity to produce articles that appeared in the Lamplighter, but it was unknown to what extent

this happened concerning the May and June, 1997 Lamplighter issues. The Lamplighter was published and mailed to Respondent's members without cost to Respondent by the Chronicle Shopper, Inc., in exchange for revenue which the Chronicle Shopper was able to raise through advertisements.

Respondent contends that since no resources of Respondent were used to publish or distribute the Lamplighter newsletter there can be no violation of Section 401(g). Complainant argues that various courts have interpreted "monies" to include any thing of value without the actual expenditure of cash. Brennan v. Sindicato Empleados de Equipo, 370 F.Supp. at 879; Donovan v. Local Union 70, International Brotherhood of Teamsters, 661 F.2d at 1202. Indeed, McLaughlin v. American Federation of Musicians, 700 F. Supp. at 735 which was cited by Respondent provides a broad interpretation of "money" under Section 401(g) . In accord with these cases and those immediately following, I find that Respondent's printing arrangement with Chronicle Shopper, Inc. constituted the receipt of value, i.e., publication of union newsletter without Respondent having to pay for its printing or distribution, and thus constituted the receipt of "money" as broadly defined by the courts. Donovan v. Metropolitan District Council of Carpenters, 797 F.2d at 145; Schultz v. Local Union 6799, United Steelworkers of America, 426 F.2d at 972; Reich v. Local 843, Bottle Beer Drivers, 869 F. Supp at 1147; Donovan v. Local 719, United Automobile Aerospace and Agricultural Implement Workers of America, 561 F. Supp. at 56-57.

Having found that Respondent's use of its Lamplighter newsletters constituted the receipts of moneys under Section 401(g), the next issue which I must address is whether either the May or June, 1997 Lamplighter newsletters contained material promoting the candidacy of either Long or Bradford. It is well accepted that once a member's candidacy for union office is announced, a union cannot expend its funds to publish and distributed a newsletter laudatory of one candidate and derogatory of his opponent. Bliss v. Holmes, 721 F.2d at 158 (6th Cir. 1983); Usery v. International Organization of Masters, 538 F.2d at 949. It makes no difference if the amount of money spent by the union in the promotion of its candidates is minimal for there is no exemption for small expenditures. Usery v. Stove, Furnace and Allied Appliance Workers, 547 F.2d 1043, 1045 (8th Cir. 1977); Shultz v. Local Union 6799, United Steelworkers of America, 426 F.2d at 972.

Courts have been often faced with situations analogous to the present case wherein union newsletters contain articles about incumbent officers and are required to determine whether such articles constitute legitimate coverage providing information of interest to the membership as opposed to improper promotion of candidates. In Donovan v. Metropolitan District Council of Carpenters, 797 F.2d 140, 145 (3rd Cir. 1986) the Court provided the following guidance:

> These courts have recognized than an incumbent "will in the nature of things be an important participant in many matters of interest to the membership and be more likely to have his participation in these matters subject of inclusion in any report to the membership through the [newspaper]." Yablonski, 305 F. Supp. at 871. "So long as such coverage is addressed to the regular functions, policies and activities of such incumbents as officers involved in matters of interest to the membership, and not as candidates for reelection, there is no violation of [the Act]." Camarata, 478 F. Supp.

> at 330. Section 401(g) is only violated when "the tone, content and timing of the...publications...effectively encourage and endorse the re-election of [the incumbent. Donovan v. National Alliance of Postal and Federal Employees, 566 F. Supp. 529, 532 (D.D.C. 1983), appeal dismissed, 740 F.2d 58 (D.C. Cir. 1984); cf. New Watch-Dog Committee, 438 F. Supp. at 1251.
>
> A similar analysis seems appropriate here. For the Council to function effectively, participants must have some latitude to speak freely about matters of current concern to members, although these may often be campaign issues as well, even though their statements may be made with that fact in mind. As the Camarata court noted, " [d]uly elected union officials have a right and a responsibility to exercise the powers of their office and to report to the membership on issues of general concern." 478 F. Supp. at 330. And the minutes will only serve their purpose--recording the Council's deliberations, and informing the membership of those deliberations and of actions taken--if they accurately reflect what is said at the meetings. This is not to say that anything said at a Council meeting and reported in the minutes is thereby immune from scrutiny under 401(g); on the contrary, union officers may not use official time or minutes distributed by union funds to campaign. See 29 C.F.R. § 452.76 (union officers are forbidden to campaign on union time or to use union funds to assist their campaigning). But in deciding whether a given act constitutes campaigning, we must be mindful of the union's need for free and open discussion if it is to govern itself effectively.

Thus, it is necessary to examine the tone, content, and timing of the Lamplighter newsletters to determine they constituted prohibited campaign material or rather as urged by Respondent were merely the dissemination of necessary information to accurately inform its members of the action taken against Long which resulted in his suspension from office.

In order to evaluate the tone, timing and content of articles in the context of Section 401(g) one must look at the circumstances surrounding the challenged publications. See Hodgson v. Liquor Salesmen's Union Local No.2, 334 F. Supp. at 1377. Increasing the diversity of views expressed to union members serves the overriding purpose of the LMRDA. Favorable or unfavorable reporting regarding an incumbent preceding an election does not necessarily violate Section 401(g) because union members need to have some latitude in speaking freely about matters of current concern to members even though these matters may often be campaign issues as well. Donovan v. Metropolitan District Council of Carpenters, 797 F.2d at 145.

Concerning the tone and content of the Lamplighter issues there is no dispute that they accurately reflect the facts leading to Long's suspension from office, i.e., Long was accused and found guilty of 3 of 7 charges relating to his conduct as president in not representing union members. Although the Lamplighter newsletters do not specify the exact 3 charges Long was found guilty of having committed, they do list the 7 charges which included improper negotiations with management, malfeasance in office, refusal to allow the chief steward to perform prescribed and elected duties,

providing false information to general membership, allowing privileged information to be disseminated about a client to general membership, and denial of proper member representation. In addition, the newsletters criticized Long's dictatorial actions and failure to consider grievances, deal above board and work with members, and most importantly his action in undermining favorable arbitration awards by unilaterally and secretly entering into an agreement with SJA nullifying favorable arbitration decisions for engineering technicians thus causing Respondent to throw away $2,900 in union funds and countless hours of work solely to "get even" with the technicians.

There is also no dispute that Long's action directly affected the ability of Respondent to properly and fairly represent its members and thus constituted matter of vital interest to its members. Complainant, while citing Brock v. Connecticut Union of Telephone Workers, Inc., 703 F. Supp. 202, at 207, states that there is a line between permissible reporting of Long's activities and impermissible attacks on him which misrepresents facts and does not serve the membership. However, Complainant fails to show any alleged misstatement of fact or to show how Respondent's articles crossed the line between permissible reporting of Long's misconduct and unfair criticism designed to either destroy Long's candidacy or promote Bradford bid for office.

Concerning the timing of newsletters, Respondent correctly points out that the two issues were published and distributed five and 6 months before the election and were considerably removed in time from the campaign which occurred between October 15 and November 12, 1997. There is no evidence that any of these issues were re-circulated after June 1997. There is no reference to either Long or Bradford's candidacy except for one sentence in the May 1997 article from the treasurer in which he says that Bradford had talked about running for union president in the November 1997 election, but, that Bradford instead of making Long "look bad" had tried to sit down and resolve problems with Long before his suspension.

The parties admit that Bradford was not a candidate for Respondent's presidency in either May or June, 1997 and in fact did not apparently announce his candidacy until October 15, 1997. In May and June, 1997 Long was no more than a potential candidate insofar as he was the incumbent. There is moreover no evidence to show or suggest any active campaign for Respondent's presidency until October 1997. By that time Long had already been back in office for almost 5 months. [2]

In determining the propriety of the May and June, 1997 Lamplighter issues, I find considering their timing, content, and tone that such articles did not violate Section 401(g), but rather, constituted a legitimate expression of disapproval about Long's actions as Respondent's president in failing to properly represents its members by among other things entering into agreements with management that voided favorable arbitration rulings for its members solely for the purpose of "getting even" with said members. Had not Respondent's officers expressed strong disapproval of Long's action, they like Long could easily and justifiable been criticized for violating their trust as union officers. As such, I find the Lamplighter coverage addressed regular functions, policies and activities of Long which were of vital interest to Respondent's membership which were not only permissible activity

[2] On June 6, 1997 Long returned to the office of president of Respondent.

within the meaning of Section 401(g) but also necessary for Respondent's effective self governance by maintaining free and open discussion of issues among its members. Donovan v. Metropolitan District Council of Carpenters, 797 F.2d at 145.

Complainant places considerable reliance under Guzman v. Local 32B-32J, Service Employees International Union , 151 F.3rd.86 (2nd Cir. 1998) and Bliss v. Holmes, 721 F. 2d. 156, 158-159 (6th Cir. 1983) for the fact that newsletters published as much as 7 months before an election can still be improper under Section 401(g). Such reliance is misplaced because in both those cases unlike the present there existed an active campaign at time of publication and thus a possibility that such conduct may have influenced the outcome of the election. At the time of publication, Bradford was not only not a candidate, he was not even a union officer having resigned from office on April 30, 1997, in response to false accusations leveled against him by Long. However, even assuming *arguendo*, the presence of a campaign in May and June, 1997, I find nothing improper in the Lamplighter's criticism of Long for his actions as union president undermined the very purpose of unionization, i.e., the fair and impartial representation of the employees it represents.

Accordingly, I find that Respondent did not violate Section 401(g) when it had the May or June 1997 Lamplighter newsletters published and circulated among its members. Thus, I find no basis to set aside the November 12, 1997 election and recommend dismissal of the instant complaint.

ORDERED this 2nd day of June, 1999, at Metairie, Louisiana.

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CLEMENT J. KENNINGTON
Administrative Law Judge